Supreme Court, U.S.
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No. 99-461

IN THE
Supreme Court of the United States

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

MICHAEL SWANKS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is appropriate for this Court to consider whether Michael Swanks' congenital birth defect, and its consequential urinary incontinence, constitutes a disability under the Americans With Disabilities Act, when the question was not presented to the Court of Appeals.

2. Whether there is any reason to revisit this Court's five year old decision in *Hess v. Port Authority Trans-Hudson,* 513 U.S. 30 (1994), when no question of Eleventh Amendment Immunity was raised in the Court of Appeals.

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BRIEF IN OPPOSITION

Michael Swanks, respondent herein, respectfully opposes the Petition for Writ of Certiorari filed by the Washington Area Transit Authority ("WMATA").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 179 F.3d 929. The decision of the District Court is unreported.

JURISDICTION

The Court of Appeals entered its judgment on June 18, 1999. WMATA seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

WMATA contends that section 102(a) of the Americans With Disabilities Act (hereafter "ADA" or "Act"), 42 U.S.C. § 12112(a), is the pertinent statutory provision. That section provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

STATEMENT OF FACTS

Michael Swanks suffers from an irreversible birth defect, spina bifida occulta. As a consequence, he is totally unable to control his urinary functions. His condition renders him highly susceptible to virulent and debilitating urinary track infections, which afflict him with severe nausea, lower back pain, diarrhea and fever. (App. 14-16; 282, 283). In 1992, WMATA fired Mr. Swanks from his position as a special police officer despite nearly three years of satisfactory performance. In 1993, he sued under the Americans With Disabilities Act ("ADA") (42 U.S.C. § 12101, et seq.), alleging, *inter alia,* that WMATA had fired him because of his disability.

From the outset WMATA did not dispute Mr. Swanks' disability. It argued instead that he was not a "qualified individual with a disability" because after his termination he successfully applied for Social Security Disability benefits.[1] WMATA also argued that Mr. Swanks was not

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[1] A successful case of disability discrimination requires the plaintiff to prove he is a "qualified individual with a disability," an individual who, though afflicted with a disability, "can perform the essential functions of [the job he holds], with or without reasonable accommodation." 42 U.S.C. §§ 12111(8), 12112(a).

"qualified" because his special police commission— assertedly a prerequisite for his job—had expired. The trial court held there were issues of fact regarding the latter issue, but granted summary judgment on the former. On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the receipt of Social Security disability benefits did not bar Mr. Swanks' ADA action. *Swanks v. Washington Metropolitan Area Transit Authority,* 116 F.3d 582 (D.C. Cir. 1997). *Cf., Cleveland v. Policy Management Systems Corporation,* 527 U.S. —, 119 S.Ct. 1592 (1999).

After a four-day trial a jury found that WMATA had fired Mr. Swanks because of his disability. Returning to the Court of Appeals, WMATA renewed its contention that the loss of the special police commission robbed Mr. Swanks of "qualified" status as a matter of law. It also argued that the evidence was insufficient to support the jury's finding of discrimination. Pet. App. 2a. The Court of Appeals rejected both contentions and affirmed the verdict. On the question of the special police commission, the Court of Appeals concluded that

> a reasonable juror could find that possessing the commission was not a prerequisite to being hired, and that new employees simply had to possess the *ability* to obtain such a commission, and hence the jury had sufficient evidence to find that Swanks was a "qualified individual" with a disability under ADA.

Pet. App. 9a. The Court of Appeals also found that the evidence as to WMATA's reasons for terminating Mr. Swanks was conflicting and that a reasonable juror could conclude that "WMATA, being unwilling to tolerate an employee with repeated absences, decided to apply its special commission requirement more strictly than it normally would to remove Swanks because of his disabilty." Pet. App. 10a.

ARGUMENT

WMATA offers nothing close to a "compelling" reason for a grant of review in this case. In two trips to the Court of Appeals, WMATA never argued that Mr. Swanks does not suffer from a disability as defined by the ADA. Nor did it suggest at any juncture that the Eleventh Amendment immunized it from Mr. Swanks' claims. Now it asks this Court to take jurisdiction on just those grounds. In addition, though it suggests otherwise, WMATA has identified no real conflict in the circuits resulting from the decision below.

1. WMATA first contends that this Court should review the judgment below to determine whether Mr. Swanks' condition constitutes a disability under the ADA. But it did not contest Mr. Swanks' disabilty status in the Court of Appeals. Rather its appeal focused on whether Mr. Swanks, *though suffering from a disability*, met the Act's additional requirement that he be "qualified . . . to perform the essential functions" of his job. 42 U.S.C. § 12112(a).

WMATA suggests that this Court's decisions last term in *Sutton v. United Air Lines*, 527 U.S. —, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. —, 119 S.Ct. 2133 (1999); and *Albertson's Inc. v. Kirkingburg*, 527 U.S. —, 119 S.Ct. 2162 (1999) warrant an assumption of jurisdiction in this case. However, those decision addressed the scope of the Act's definition of "disability." They have no application to this case, where Mr. Swanks' disability has been conceded.

Moreover, having been to the Court of Appeals twice without contesting Mr. Swanks' status as a disabled individual, it is entirely inappropriate for WMATA to ask this Court to review that status now for the first time.

This Court has consistently held that it will not review questions that were not raised below. *See Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider them.").

Even if it were appropriate for the Court to expend its resources examining questions which were not raised below, there are no important or novel issues lurking behind Mr. Swanks' heretofore conceded status as an individual with a disability. His condition unquestionably brings him within the Act's definition of disability. He has "a physical or mental impairment that substantially limits one or more of [his] major life activities." 42 U.S.C. § 12102(2)(A). "[P]hysical impairment," under the EEOC's regulations, includes a "physiological disorder . . . affecting [the] genito-urinary [system]," while "[m]ajor life activities" include "caring for oneself." *See* 29 C.F.R. § 1630.2(h)(1) & (i).[2] The "nature and severity of the impairment," its duration and its permanence are critical to the determination whether an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j)(2)(i-iii). The permanent and irreparable urinary incontinence endured by Mr. Swanks, together with its undisputed side effects, plainly constitutes a "physiological disorder . . . affecting [his] genito-urinary [system]," which "significantly restricts" his ability to carry out a most basic bodily function.

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[2] These EEOC regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

Nothing in the reasoning of last term's decisions could alter this conclusion. The decisions in *Sutton* and *Murphy* essentially held that in evaluating a claim of disability under the ADA the effect of corrective measures must be taken into account. In *Sutton* the plaintiffs suffered from severe myopia. But the Court held that they were not disabled within the meaning of the ADA because with corrective lenses they "function identically to individuals without an impairment." 119 S.Ct. at 2149. Similarly, in *Murphy*, the Court held that a mechanic whose high blood pressure was entirely controlled by medication was not disabled within the meaning of the ADA.[3]

There are no corrective measures available to Mr. Swanks. He can take steps to minimize the more embarrassing manifestations of his disability, but there is nothing he can do to alter its affects on his bodily functions or its impact on his urinary track. Thus, there obviously were good reasons for WMATA's decision not to contest Mr. Swanks' disabled status in the Court of Appeals. Its change of position now is nothing more than obvious opportunism.

2. WMATA also argues that the Court should grant certiorari in order to use this case to resolve an asserted split in the circuits over the question "whether state-level sovereign entities such as WMATA are immune from suit under the ADA." Pet. at 6. This issue too is being raised for the first time in this Court. WMATA did not raise the

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[3] The concerns addressed by the Court in *Kirkingburg* are even further removed from the circumstances of this case. The question before the Court was "whether under the [ADA] an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case." 119 S.Ct. at 2165. The Court's resolution of this question obviously has no bearing on the proper disposition of this case.

question of imunity from suit under the ADA in the District Court or in either of its two visits to the Court of Appeals.

As with its eleventh hour request that the Court examine the question of Mr. Swanks' disability, WMATA may not now secure this Court's review of Eleventh Amendment claims which were not even suggested below. *See Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998) (Title II of the ADA held applicable to state prison system, the Court declining to reach the question of Eleventh Amendment immunity which was "addressed by neither the District Court nor the Court of Appeals"); *Dothard v. Rawlinson*, 433 U.S. 323, 324, n.1 (1977) (Court refused to hear question of the constitutionality of Title VII's coverage of state governments: "Not having been raised in the District Court, that issue is not before us.")[4] As the Court has recently explained, even where Eleventh Amendment immunity is present, it may be waived when a state "allow[s] a federal court to hear and decide a case comemnced or prosecuted against it." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). Unlike Article III of the Constitution, "[t]he Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject matter jurisdiction." *See id.*

In any event, no split in the circuits results from the decision below. In fostering its contention that the court of appeals decision has spawned a circuit conflict, WMATA describes itself as a "state-level sovereign" entity. This is misleading. For WMATA is, of course, not the arm of any state. It is rather a Compact Clause en-

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[4] *See also Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970), both discussed *supra*.

tity formed by the District of Columbia, Maryland and Virginia with the approval of Congress. There is no conflict in the circuits as to whether the Eleventh Amendment protects Compact Clause entities like WMATA from ADA claims.[5] This is quite unsurprising since just five years ago this Court held that such entities do not generally enjoy Eleventh Amendment immunity. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994). In short, even if the issue could properly be raised—which it cannot—there is no pertinent split in the circuits.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[5] To be sure, as WMATA notes in its Petition, one circuit, the Eighth, has recently concluded that the Eleventh Amendment protects the states from ADA suits. *Alsbrook v. City of Maumelle*, 184 F. 3d 999 (1999) (*en banc*)